Supreme Court, U.S.
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No. 99-95

In The

Supreme Court of the United States

R.R. AND BARBARA ANDERSON,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant a petition for certiorari to review the Eighth Circuit's use of the abuse of discretion standard, rather than the inapplicable plain error standard urged by the Petitioners, in reviewing the District Court's grant of new trial where a juror conducted an improper out-of-court experiment and then lied to the District Court about it.

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6

Respondent Ford Motor Company has no parent corporation and no other corporation has a financial interest in this matter. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%.

United States – The Hertz Corporation

Consumers Car Club

Collision Team of America, Inc.

Ecostar Electric Drive Systems, L.L.C.

FRN of San Diego, LLC

FRN of Tulsa, LLC

Argentina – Invercred Compania Financiera S.A.

Australia – Ford Motor Company of Australia Limited

Belgium – Ford Motor Company (Belgium) N.V.

Brazil – Autolatina Comercio e Participacoes Financerias Ltd.

Denmark – Ford Motor Company A/S

Finland – Oy Ford Ab

Germany – Ford Werke-Aktiengesellschaft

Holland – Ford Nederland B.V.

Japan – Mazda Motors Corporation

Korea – Ford Motor Company of Korea

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6 – Continued

Norway – Ford Motor Norge A.S.

Pivco Industries AS

New Zealand – Ford Motor Company of New Zealand Limited

Singapore – Ford Motor Company Private Limited

Switzerland – Ford Motor Company (Switzerland) S.A.

Vietnam – Ford Vietnam Limited

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ford Motor Company ("Ford") respectfully requests this Court deny the Petition for a Writ of Ceriorari seeking review of the United States Court of Appeals for the Eighth Circuit's affirmation the District Court for the Western District of Missouri's grant of new trial.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE EIGHTH CIRCUIT APPLIED THE APPROPRIATE STANDARD OF REVIEW IN DETERMINING THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE OUT-OF-COURT TEST CONDUCTED BY A JUROR PREJUDICED FORD

Petitioners argue the Eighth Circuit's opinion departed from the standard set forth in *U.S. v. Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Petitioners' reliance on *Olano* is misplaced. *Olano* does not address the proper standard for determining whether a juror's misconduct warrants a new trial. Rather, *Olano* addresses the power of a court of appeals under Federal Rule of Criminal Procedure 52(b) to correct an error of the district court.

In *Olano*, the Supreme Court reviewed the Ninth Circuit's reversal of the convictions of the respondents based upon the fact that the district court, without objection of the parties, allowed alternate jurors to be present during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c). *Id.* at 729. Rule 24(c) requires

alternate jurors be discharged prior to deliberations. *Id.* The Ninth Circuit had held the presence of the alternate jurors was reversible per se under the "plain error" standard of Rule 52(b). *Id.* The Supreme Court noted no hearing had been conducted pursuant to Federal Rule of Evidence 606(b) to determine whether the alternate jurors participated in deliberations or influenced the verdict and, accordingly, the record was devoid of evidence of prejudice to the respondents. *Id.* The Supreme Court held the presence of the alternate jurors was not an error the Ninth Circuit was authorized to correct under Rule 52(b) because the error did not affect the respondents' substantial rights. *Id.* at 740.

Contrary to the Petitioners' claim, the appropriate standard for determining whether juror exposure to extraneous material warrants a new trial is set forth in *Banghart v. Origoverken*, 49 F.3d 1302, 1306 (8th Cir. 1995):

> In a civil case the exposure of jurors to extraneous material not admitted into evidence mandates a new trial *when it is established that the materials are prejudicial* to the unsuccessful party. *Banghart v. Origoverken, A.B.*, 49 F.3d 1302, 1306 (8th Cir. 1995).

The appropriate method for the District Court to determine whether an extraneous juror experiment is prejudicial is by considering whether "there is a reasonable possibility that the communication altered [the jury's] verdict." (citing *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142 (7th Cir. 1992)).

The Eighth Circuit appropriately determined that the District Court, after conducting a hearing pursuant to Federal Rule of Evidence 606(b), concluded that a juror

had taken his son, who is 4' 8" tall, to a Ford dealership and conducted a fit test of the restraint system of a Ford Probe. As the Eighth Circuit noted, the District Court found the out-of-court test prejudiced Ford based upon the following findings: (1) the out-of-court test involved a controlling issue of whether the restraint system of the 1991 Probe was designed to fit small persons so that they would be protected in a collision; (2) the out-of-court test was a significant matter considered by Willis in joining the verdict; (3) Willis conducted the out-of-court test with knowledge that he was violating the District Court's instructions; (4) Willis was not truthful with the District Court at the hearing regarding the out-of-court test he conducted; and (5) Willis was prejudiced against Ford. (Petitioners' Apdx. A, pp. 8-9). The Eighth Circuit determined these conclusions were properly within the province of the District Court and supported the finding of prejudice to Ford. (Petitioners' Apdx. A, p. 9).

Likewise without merit is Petitioners' argument that the transcript of September 11, 1998, pre-trial conference for the second trial shows the District Court did not believe the out-of-court test prejudiced Ford. Specifically, Petitioners cite to a portion of the transcript where the District Court, in an attempt to encourage settlement of the case before the second trial, stated:

> I think I know you all well enough that it probably is a waste of time to ask if there is any possibility of this case being settled at this point. I suppose we probably wouldn't be here if it was and everybody has got an awful lot in this. And I imagine that would present some difficulty to you. But what's your position on any effort to settle, Pedro? [Plaintiffs' counsel]

. . . .

> I mean, obviously, Ford has got some exposure in this case and we saw that last time. And quite frankly, I think that even without the juror going out and doing the seat belt test, that jury was inclined to find in plaintiffs' favor and that can happen again. I mean I think that and I don't mean this as any kind of criticism of your position on it either, Rob [Ford's counsel], but you know it's worth a lot more than $50,000 to Ford to get out of this case.
>
> And, you know, probably the verdict that they got last time is at the high end of the spectrum on things. And, you know, but the case, it's worth several hundred thousand dollars in my estimation, easily. If you all would like to have me refer this to a magistrate to try and mediate some discussion with you all on it, I'd be more than happy to do that.

(Petitioners' Apdx. D, p. 101).

Petitioners' attempt to dispute or taint the findings made by the District Court in the New Trial Order is improper. The District Court specifically granted Ford's motion for new trial on the grounds that the juror's out-of-court test prejudiced Ford. The statements later made by the District Court at the pre-trial conference to encourage settlement cannot be used to show the District Court did not believe the juror misconduct was prejudicial to Ford. *See Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 741 F.2d 41, 43 (4th Cir. 1984) ("[c]ourts must speak by orders and judgments, not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or

after trial, or during argument. When the terms of a judgment conflict with either a written or oral opinion or observation, the judgment must govern."); *Segars v. Atlantic Coast Line Railroad Co.*, 286 F.2d 767, 770 (4th Cir. 1960) ("It is the formal order that determines the action of the court rather than some chance statement or observation made by the Judge during the course of oral argument."). Further, the statements made by the District Court at the pre-trial conference were in the context of encouraging settlement by saying, in effect, that neither party could be assured of getting the result they wanted out of the second trial and cannot be construed as amending the New Trial Order.

The Eighth Circuit's holding is in accord with its precedent as well as precedent from the other circuits.

CONCLUSION

The lower courts properly applied the correct standard in determining the juror's out-of-court experiment was prejudicial to Ford. Accordingly, consideration by this Court is not warranted.

Respectfully submitted,

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